SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 300

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, ETC., PETITIONER

vs.

MILTON C. HELLMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Writ of Error.

In the District Court of the United States Within and For the Eastern Division of the Eastern Judicial District of Missouri.

Milton C. Hellman, Plaintiff,
No. 6990 vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

The President of the United States, to the Honorable Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri,—Greeting:

Because, in the record and proceedings, and in the rendition of the judgment in a cause which is in the District Court, before you, at the March Term, 1925, wherein Milton C. Hellman was plaintiff and Arnold J. Hellmich, Collector, was defendant, is alleged manifest error hath happened to the injury and damage of the defendant, as by its complaint appears.

Therefore, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the 8th Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the 8th Circuit on or before the 10th day of January, 1926, to the end that the records and proceedings aforesaid being inspect-
2 ed, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws of the United States should be done.

Witness, the Honorable Chas. B. Faris, Judge of the District Court of the United States within and for the Eastern District of Missouri ths 10th day of November, 1925.

Seal
U. S. Dist. Court
East. Div.
East Jud.
Dist. of Mo.

Issued at office in the City of St. Louis with the seal of the District Court and dated as aforesaid.

JAS. J. O'CONNOR,
Clerk, District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Allowed by:
C. B. Faris,
Judge.

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3 Return To Writ.

In the District Court of the United States Within and for the Eastern Division of the Eastern Judicial District of Missouri.

Milton C. Hellman, Plaintiff,
No. 6990. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

In obedience to the command of the within and foregoing writ, I herewith transmit to the United States Circuit Court of Appeals for the 8th Circuit a duly certified transcript of the record and proceedings in the above-entitled cause, with all things concerning the same.

Seal
U. S. Dist. Court
East. Div.
East. Jud.
Dist. of Mo.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said District Court, at office in the City of St. Louis, this .... day of ....., 1925.

JAS. J. O'CONNOR, Clerk.

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4 **Citation.**

In The District Court Of The United States Within And For The Eastern Division Of The Eastern Judicial District Of Missouri.

Milton C. Hellman, Plaintiff,
No. 6990. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

The United States Of America To Milton C. Hellman, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the date this citation bears, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

In Witness Whereof, I, the undersigned Judge of the District Court of the United States for the Eastern District of Missouri have hereunto signed my name this 10th day of November, in the year one thousand nine hundred and twenty-five.

C. B. FARIS,
United States District Judge.

Service of the above citation is hereby acknowledged this 10th day of November, 1925.

HENRY H. FURTH
Attorney for Plaintiff.

5 United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Be It Remembered, that heretofore, to-wit: on the 17th day of February, 1925, there was filed in the office of the Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, a petition wherein Milton C. Hellman is Plaintiff, and Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is Defendant, Cause No. 6690 At Law, which said petition is in words and figures as follows, to-wit:

6 (Petition.)

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

March Term, 1925.
Milton C. Hellman, Plaintiff,
6990-1 vs.
Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri. Defendant.

The plaintiff for his cause of action against defendant alleges as follows:

That plaintiff is a citizen of the United States and at all times hereinafter mentioned, resided and now resides in the City of St. Louis in the State of Missouri.

That the defendant was in the year 1923 and now is the duly appointed Collector of United States Internal Revenue for the First District of Missouri.

That this is a suit of a civil nature at common law, arising under the constitution and laws of the United States and under the laws of the United States pertaining to Internal Revenue.

That the plaintiff was on the 31st day of December, 1919 the owner of one half of the capital stock of Hellman & Sons Fur & Wool Company, a corporation organized and incorporated under the laws of the State of Missouri and carrying on business in the City of St. Louis as a dealer in furs and

wool; that capital was a material income-producing factor in the business of said corporation and fifty (50%) percent or more of its gross income consisted of gains and profits from trading as a principal.

That the books of account of said corporation showed that on said 31st day of December 1919 its paid-up capital stock was Twenty-seven Thousand, Six Hundred Dollars ($27,600) and its surplus was Sixty-one Thousand, Five Hun-
7 dred Sixty and 26/100 Dollars ($61,560.26); that on said day said corporation was also indebted to the United States for income tax and excess profits tax on its income for the calendar year 1919, the exact amount of which had not been ascertained and which did not appear on its books, but was later determined to be Fifteen Thousand Ninety-three and 99/100 Dollars ($15,093.99) leaving a net surplus at that time of Forty-six Thousand Four Hundred Sixty-six and 27/100 Dollars ($46,466.27) Dollars; that of said surplus at least Thirty-one Thousand, Five Hundred Forty-five and 58/100 Dollars ($31,545.58) consisted of earnings and profits accumulated by said corporation since February 28th, 1913.

That on said 31st day of December 1919 said corporation was duly dissolved and liquidated, the assets thereof were distributed to the shareholders of said corporation in accordance with their several interests therein, and they assumed the liability of said corporation to the United States for taxes on its income for 1919.

That in said liquidatiion plaintiff realized a gain of Fifteen Thousand, Four and 55/100 Dollars ($15,004.55) all of which consisted of plaintiff's share of the surplus of said corporation and was a distribution made by said corporation to its stockholders out of its earnings or profits accumulated since February 28th 1913 and as such, was taxable to plaintiff as a dividend, as dividends are defined in Section 201 (a) of the Revenue Act of 1918.

That on or before the 15th day of March 1920 plaintiff made and filed with the Collector of United States Internal Revenue for the First District of Missouri, a return of his income, gains and profits for the calendar year 1919 in the manner and [and] form prescribed by law; that plain-
8 tiff's total taxable net income for said calendar year 1919 was Twenty-five Thousand, One Hundred Fifty-

one and 68/100 ($25,151.68) derived from the following sources, to-wit:

Salary	$10,012.50
Profit from the liquidation of Hellman & Sons Fur & Wool Company,	15,004.55
Other income	220.87
Taxable interest on U. S. obligations	56.07
	$25,293.99
Less allowable deductions,	142.31
Net taxable income	$15,151.68

That under the provisions of Section 216, Subdivisions (a), (b), (c) of the Revenue Act of 1918 the plaintiff was entitled to the following credits for the purpose of the normal tax only, to-wit:

Subd. (a) The amount of the dividend, that is to say, the gain realized by him from the liquidation of Hellman & Sons Fur & Wool Company,	$15.004.55
Subd. (b) The amount received as interest on obligations of the United States and included in gross income,	56.07
Subd. (c) Personal exemption,	1,000.00
Total credits,	$16,060.62

That plaintiff's net income for the calendar year 1919 subject to normal tax was Nine Thousand, Ninety-one and 06/100 Dollars ($9,091.06) of which said income the sum of Four Thousand Dollars, ($4,000) was taxable at four (4%) percent and the remainder was taxable at eight (8%) percent; that the total normal tax due from plaintiff on his said income was Five Hundred Sixty-seven and 30/100 ($567.30); that the surtax assessable thereon was One Thousand Two Hundred Sixteen and 68/100 Dollars ($1,216.68) and the total tax due from the plaintiff on his income for the calendar year 1919 was One Thousand Seven Hundred Eighty-three and 98/100 ($1,783.98) Dollars.

That thereafter, to-wit: on or about the 30th day of July 1923, the Commissioner of Internal Revenue gave notice to plaintiff that an examination of plaintiff's income tax returns for the years 1919 and 1920 disclosed an additional tax liability on the part of plaintiff for Two Thousand, Three Hundred

Thirty-one and 58/100 Dollars ($2,331.58) for the year
9 1919 and an over assessment of One Thousand Fifty and 49/100 Dollars ($1,050.49) for the year 1920, that is to say, a net tax liability of One Thousand Two Hundred Eighty-one and 09/100 Dollars ($1,281.09) and granted plaintiff thirty (30) days within which to file an appeal and show cause why such additional tax of Two Thousand, Three Hundred Thirty-one and 58/100 Dollars ($2,331.58) for the year 1919 should not be paid.

That thereafter, to-wit: on or about the 28th day of August 1923 plaintiff admitted liability for an additional tax of One Thousand One Hundred Thirty-one and 23/100 Dollars ($1131.23) for the calendar year 1919, but denied liability for the remainder of the alleged demand, to-wit: the sum of One Thousand Two Hundred and 35/100 Dollars ($1,200.35) and appealed to the Commissioner of Internal Revenue and showed cause why said amount of One Thousand Two Hundred and 35/100 ($1,200.35) Dollars should not be paid.

That thereafter, to-wit: on or about the 4th day of January 1924 said Commissioner of Internal Revenue advised the plaintiff that his said appeal had been denied and that said additional tax of Two Thousand, Three Hundred Thirty-one and 58/100 ($2331.58) on his income for the calendar year 1919 would be assessed against him.

That the Commissioner of Internal Revenue thereuon recomputed plaintiff's tax on his income for the calendar year 1919 and reassessed the same as follows:

Said Commissioner allowed the plaintiff the following credits:

Taxable interest on U. S. Bonds	$ 56.07
Personal exemption	1,000.00
	1,056.07

But said commissioner failed and refused to allow as a credit for the purpose of the normal tax, as provided in Section
216 (a) of the Revenue Act of 1918, the sum of Fif-
10 teen Thousand Four and 55/100 Dollars ($15,004.55) the gain realized by plaintiff in the liquidation of Hellman & Sons Fur & Wool Company, but included the same in the income subject to the normal tax, although it fully appears that said gain consisted of a distribution by said corporation to its shareholders out of its earnings or profits accumulated since February 28th, 1913, and said Commis-

sioner of Internal Revenue assessed against plaintiff on his income for the calendar year 1919, including said gain of Fifteen Thousand Four and 55/100 Dollars ($15,004.55) in the liquidation of said corporation, a normal tax of One Thousand Seven Hundred Sixty-seven and 65/100 Dollars ($1,767.65) and a surtax of One Thousand, Two Hundred Sixteen and 68/100 ($1,216.68) Dollars, the total tax for said year assessed against plaintiff being, Two Thousand Nine Hundred Eighty-four and 33/100 Dollars ($2,984.33).

That thereafter, to-wit: on or about the 5th day of March 1924 defendant served notice on plaintiff of the assessment of said additional tax of Two Thousand, Three Hundred Thirty-one and 58/100 Dollars ($2,331.58) on plaintiff's income for the calendar year 1919 and of the credit of One Thousand Fifty and 49/100 Dollars ($1,050.49) the over assessment against plaintiff for the year 1920, applying the same as a credit against said additional assessment of Two Thousand Three Hundred Thirty-one and 58/100 Dollars ($2,331.58), and defendant duly demanded of plaintiff payment of the sum of One thousand, Two hundred Eighty-one and 09/100 Dollars ($1,281.09) being the amount of said additional assessment for the calendar year 1919, diminished by the amount of the over-assessment of One Thousand, Fifty and 49/100 Dollars ($1,050.49) for the calendar year 1920.

That on the 17th day of March 1924 plaintiff paid to defendant voluntarily, the sum of Eighty and 74/100 ($80.74) Dollars, the amount which plaintiff admitted to be due from him to the United States on account of balance of the tax on his income for the year 1919, and at the same time,
11 in order to avoid distraint and penalties, paid to defendant, under protest, the sum of One Thousand, Two Hundred and 35/100 ($1,200.35) Dollars the amount assessed against him by the Commissioner as additional tax on his income for 1919, for which liability is denied by plaintiff.

That thereafter, to-wit: on or about the 4th day of June 1924 plaintiff filed a claim with the Commissioner of Internal Revenue for the refund of said sum of One Thousand, Two Hundred and 35/100 Dollars ($1,200.35.) so paid by plaintiff under protest.

That on or about the 12th day of November 1924 plaintiff was advised by said Commissioner of Internal Revenue, that his said claim for refund had been denied by said Commissioner of Internal Revenue.

That inasmuch as said gain of Fifteen Thousand, Four and 55/100 Dollars ($15,004.55) realized by plaintiff in the liquidation of the aforesaid corporation, said Hellman & Sons Fur & Wool Company, and returned by plaintiff as part of his income for the calendar year 1919 was a distribution made by said corporation to its shareholders out of earnings and profits accumulated by it since February 28th, 1913, said gain constituted a dividend as defined in Section 201 (a) of the Revenue Act of 1918 and was not subject to the normal income tax; and that the normal tax at the rate of eight (8%) percent assessed thereon was improperly and illegally assessed against the plaintiff and the collection of said tax from the plaintiff by the defendant was improper and illegal. and the plaintiff is entitled to recover the same.

Wherefore, plaintiff demands judgment against the defendant in the sum of Twelve Hundred and 35/100 ($1200.35) Dollars with interest thereon at the rate of six (6%) percent per annum from the 17th day of March 1924 together with the costs and disbursements of this action.

(Signed) HENRY H. FURTH.
Attorney for Plaintiff.
720 Rialto Building.

12 State of Missouri,
City of St. Louis.—ss.

Milton C. Hellman, the plaintiff herein, being first sworn according to law, makes oath and says that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

(Signed) MILTON C. HELLMAN

Subscribed and sworn to before me this 13th day of February 1925. My Commission expires Feb. 10, 1929.

(Signed) L. C. DIETRICH
(Seal) Notary Public.

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13 (Demurrer of Defendant to Petition.)

(Filed March 23, 1925).

Comes now Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, the defendant in the above styled cause, by his attorney, Claude M.

Crooks, Assistant United States Attorney, and demurs to the petition herein, for the reason that the said petition does not state a cause of action against this defendant upon which this plaintiff can recover.

(Signed) CLAUDE M. CROOKS

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14 (Order of Submission of Demurrer to Petition.)

June 1, 1925.

Now on this day comes plaintiff by his attorney and comes also defendant by the United States District Attorney for the Eastern Judicial District of Missouri; whereupon the demurrer of the defendant to the petition of plaintiff is by agreement of parties submitted to the Court on briefs to be hereafter presented.

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15 (Order overruling Demurrer to Petition.)

July 7, 1925.

Now on this day the Court having considered the demurrer of defendant to the petition of plaintiff herein, being fully advised in the premises, doth Order that said demurrer of defendant be, and it is hereby, overruled. (Oral Opinion.)

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16 (Record entry of filing of Opinion and overruling Demurrer to Petition.)

July 10, 1925.

Now on this day there is received and filed herein memo of oral, opinion of Court on demurrer of defendant to petition.

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17 Memorandum of Oral Opinion of the Court.

This case was submitted to the Court some days since on a demurrer of the defendant to the petition of plaintiff.

Plaintiff sues defendant, as the Collector of Internal Revenue for the First District of Missouri, to recover the sum of $1,200.35 paid by him under protest, as a normal income tax on the sum of $15,004.55, derived, as the petition alleges, from plaintiff's one-half share in the surplus and profits of the Hellman & Sons Fur & Wool Company, which surplus and profits had accumulated since February 28th, 1913.

The above-named Company went into voluntary liquidation on the thirty-first day of December, 1919, and the capital stock, presumably, and the said surplus and profits, as it is alleged, were distributed among the plaintiff and one other, who, it seems, constituted all of the stockholders of this corporation.

When the above Company was liquidated it had a capital stock of $27,600.00, held, as already said, and surplus and profits of $61,560.26. This latter sum of surplus and profits was, it seems, ultimately reduced to the sum of $30,009.60, by deductions and exemptions of a sort not pertinent to this inquiry. The sum which remains thereupon was divided between plaintiff and another, each of whom took one-half as each, as said, had theretofore held one-half of the capital stock of the liquidating company. I am dealing here, so far as the petition is concerned (by which alone I am bound, and with which alone I am concerned) with the surplus and profits accruing since February 28th, 1913. What became of the capital stock does not appear, nor is it in issue or pertinent, so far as the petition is concerned.

18 To the plaintiff's petition, setting forth, in effect, the facts above stated, defendant demurs generally, for that the petition does not state facts sufficient to constitute a cause of action against the defendant. The briefs on both sides concede, that the single question is whether said sum of $15,004.55 was, or was not, subject to the normal tax of eight per cent., which is taxable by law as ordinary income.

The plaintiff contends that it was not so subject; the defendant contends contra. Both sides agree that the question mooted is to be solved by a determination of whether the sum of $15,004.55, tax on which is in dispute, fell under the provisions of subdivision (a) of Section 201 of the Revenue Act of 1918, or whether it fell under the provisions of subdivision (c) of said Section 201.

Plaintiff says that under the pleaded facts he is to be taxed under the provisions of subdivision (a) of the above section, while defendant contends that he falls within the purview of subdivision (c) of said section. Upon these opposite contentions both sides agree that the case turns.

So, it is obvious, without any further consideration of the law or of the statutes, that a decision of this mooted point will decide this case.

Skelitonized, so as sharply to present the point mooted, subdivision (a) of section 201, supra, says:

"Sec. 201. (a) That the term 'dividend' when used in this title **** means (1) any distribution made by a corporation **** to its shareholders or members, whether in cash, or in property, or in stock of the corporation, out of its earnings or profits accumulated," since February 28, 1913.

Now, while it is also pleaded that the corporation was dissolved and liquidated on December 31, 1919, it is fur-
19 ther pleaded that the sum of $15,004.55, tax on which is in dispute was distributed to plaintiff out of the net surplus and profits which had accumulated since February 28, 1913. The distribution, as far as the value of the capital stock of $27,600.00 is concerned, is not disclosed and, as already forecast, such stock is only mentioned incidentally, and as a part of the history of the case, and the question of what became of it is not in controversy here.

Upon these pleaded facts defendant contends that subdivision (c) of Section 201 applies. This subdivision provides:

"(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or stock distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

From a reading of this subdivision it is clear that the case as pleaded does not fall into the category of the first sentence of subdivision (c), because the payment here was not made in stock, issued to the amount of the surplus and earnings accumulated.

The second sentence of subdivision (c) of Section 201, supra, says that

"Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

It will be noted therefore, that upon the face of subdivision (a) of section 201, supra, plaintiff falls precisely within its terms. The statute says "any distribution" shall constitute a dividend. A dividend is subject to a surtax, but not to a normal tax, as was here collected. This is so for the reason

that such a dividend has already been charged with a normal tax at its source, and so ought not to be so charged a second time, but ought of course, to be charged against the tax payer for the purpose of levying thereon a surtax as provided by statute.

I am of the view that subdivision (c) of section 201 is merely supplemental to subdivision (a) of said section. Gains might well accrue from the fact that the capital stock when acquired, at or before February 28th, 1913, might be worth less than par, and before liquidation such stock might have advanced to par, or more, in which case a gain or profit would accrue to the stockholder, which should be taxed as income and not as a dividend, and which therefore, should bear not only a surtax in a proper case, but a normal tax also.

The words "realized thereby", as used in subdivision (c) supra, mean realized by the process or transaction of payment in exchange for stock or shares.

I have, correctly, I think, already eliminated the first sentence of this subdivision as inapplicable to the case as pleaded, and it will be observed that the last sentence of subdivision (c), supra, says nothing as to surplus or profits accumulated and distributed at the same time as capital is distributed.

This, I think, is taken care of by the provisions of subdivision (a) supra, even in a case of liquidation, wherein the surplus and profits accumulated since February 28, 1913, are involved and were distributed.

So construed, as supplemental to each other, well-known legal and objectionable evils are avoided, and a definite field, in no wise conflicting, is found for the operation and application of both subdivisions. Otherwise construed those provisions seem in hopeless conflict with each other.

The word "any", as used in subdivision (a) supra, is a broad term. It may well embrace distribution of surplus and profits accruing since February 28th, 1913, even though such surplus and profits are distributed upon final liquidation of the Company in which they accrue.

Moreover, subdivision (c) supra, does not in terms preclude this view; it merely says "other gains and profits." A dividend is a gain and a profit, and so a dividend is included in the term "gains and profits", and is made taxable, not as

income, however, but as a dividend; that is, it is subject to the surtax only, and not to a normal tax.

No taxing statute ought, if it can be avoided, to be so construed as to levy a double income tax on identically the same money, and unless there is a plain, unambiguous statute so warranting, no tax ought to be exacted, or can be exacted. This latter rule is well settled. The former rule mentioned is a well known rule of construction.

It is fundamental, that a court is ordinarily not bound by the construction put upon the statute by the Commissioner of Internal Revenue. If such Commissioner construes a statute correctly, well and good; if he construes it erroneously, then the courts alone are saddled with the duty of authoritatively deciding what a statute means.

No regulation by the Treasury Department, which has the effect to bring one not required by statute to pay a tax within the purview of such a statute, can stand; and, while it is regrettable that I cannot agree with the Department's construction of these statutes, which is wholly in conflict with these views, plain rules of statutory construction have been, in my opinion, violated by the departmental view and by departmental regulation in attempting to construe the two statues here dealt with in the expression of these views.

As forecast, I think I can see a field wherein subdivi-
22 sion (c) of Section 201 supra, may well operate, without the necessity of holding it in conflict with subdivision (a) of said section. This field, or one of the fields, at least, I have attempted to point out; there may be others. When this view is taken of it, the situation does not present one of double taxation, and the construction intended by Congress is rendered unambiguous. I am constrained to think that the view taken by the Treasury Department, as expressed in the Regulation under discussion, has the effect to doubly tax a single fund, and has the effect to exact a tax upon a section wholly ambiguous, and ambiguous to the extent that no valid tax can be collected thereunder.

I think the demurrer should be overruled, and so it is ordered.

(Order overruling Demurrer, etc.)

Milton C. Hellman, Plaintiff,
No. 6990-1. vs.
Arnold J. Hellmich, Collector, Defendant.

The demurrer in this case will be overruled, for the reasons given in case No. 6989.

These two cases are companion cases; what is said in one is wholly applicable to the other.

St. Louis, Missouri, July 7, 1925.

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23 (Judgment, September 12, 1925.)

Now on this day comes plaintiff in the above entitled cause by his attorney and comes also defendant by the United States District Attorney for the Eastern Judicial District of Missouri, and it appearing to the Court that Defendant heretofore filed herein his demurrer to the petition of plaintiff, which demurrer was overruled, and defendant now in open Court through said United States District Attorney declining to plead further herein, it is, therefore, on motion of said plaintiff by his attorney Ordered that judgment be entered herein in favor of plaintiff and against defendant in the sum of Twelve Hundred Dollars and Thirty-five Cents ($1200.35), together with interest thereon at the rate of six percent per annum from May 1st, 1924, to date, such interest amounting to the sum of Ninety-eight Dollars and Eighty-three Cents ($98.83), making an aggregate finding and award of judgment in favor of plaintiff and against defendant in the sum of Twelve Hundred Ninety-nine Dollars and Eighteen Cents ($1299.18);

It is, therefore, pursuant to action of defendant and finding and award of the Court as aforesaid, Ordered and Adjudged that plaintiff, Milton C. Hellman, have and recover [—] defendant, Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, the sum of Twelve Hundred Dollars and Thirty-five Cents ($1200.35), together with interest thereon at the rate of six percent per annum from May 1st, 1924, to date, such interest amounting to the sum of Ninety-eight Dollars and Eighty-three Cents ($98.83) making an aggregate judgment in favor of said plaintiff and against said defendant in the sum of Twelve Hundred Ninety-nine Dollars and Eighteen Cents ($1299.18) and that plain-

tiff also recover of defendant his costs and charges herein expended.

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24 Order for Enlarging Time for Filing Bill of Exceptions.

September 18, 1925.

Comes now Allen Curry, United States Attorney for the Eastern Division of the Eastern Judicial District of Missouri, on behalf of the above styled defendant, Arnold J. Hellmich, Collector, and makes application for an order extending the time for filing of the Bill of Exceptions herein, and cause being shown therefor, and such application is granted and the time for the filing of the Bill of Exceptions of the above named defendant is extended for sixty days from and after September 18, 1925.

(Signed) C. B. FARIS, Judge.

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25 (Record entry of filing of Petition for Writ of Error, etc.)

November 10, 1925.

Now on this day comes defendant in the above entitled cause and files herein his petition praying for the allowance of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, together with his assignment of errors on such proposed writ of error, upon consideration whereof the Court doth Order that a writ of error be, and is hereby, allowed defendant as prayed. And now a citation is issued to plaintiff, citing and admonishing him to be and appear in said United States Circuit Court of Appeals within sixty days from and after this date, which citation is duly filed.

And now defendant files herein his praecipe for transcript on such writ of error, as well as election as to the printing of such transcript.

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26 Petition for Writ of Error.

Filed November 10, 1925.

Now comes the above named Plaintiff, Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, and shows to the Court that on the 14th day of Sep-

tember, 1925 in this Court a final judgment was rendered in the above entitled cause in favor of the plaintiff, and defendant avers that in the record and proceedings had in said cause and also in the rendition of said judgment therein, certain errors were committed to the prejudice and injury of the defendant, all of which appear in detail in defendant's assignment of errors, which is filed in this cause with this Petition for Writ of Error.

Wherefore, defendant prays that a writ of error may issue in his behalf returnable to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of the error so complained of, and for the reversal of judgment entered in said cause; that a citation be issued by the Court directed to the plaintiff and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals, and for such further orders as may be proper in the premises.

(Signed) CLAUDE M. CROOKS,
Assistant United States Attorney,
Attorney for Defendant.

To the Clerk of this Court:

The above petition is granted, let the writ issue as prayed.

(Signed) C. B. FARIS
Judge.

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27 Assignment of Errors.

Filed November 10, 1925.

Now comes the defendant in the above entitled cause and presents to the Court his assignment of errors, which he alleges were committed in the record and proceedings had in said cause, and also in the rendition of said judgment in the above cause, to his prejudice and injury as follows:

I.

In overruling defendant's demurrer to plaintiff's petition.

Wherefore, because of the error herein above assigned, defendant prays that the judgment entered by the District Court in the above cause be reversed and set aside.

(Signed) CLAUDE M. CROOKS
Assistant United States Attorney,
Attorney for Defendant.

---

28 (Copy of Citation and Acknowledgment of Service.)

The United States of America to Milton C. Hellman, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the date this citation bears, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

In Witness Whereof, I, the undersigned Judge of the District Court of the United States for the Eastern District of Missouri have hereunto signed my name this....day of November, in the year one thousand nine hundred and twenty-five.

(Signed) C. B. FARIS
United States District Judge.

Service of the above citation is hereby acknowledged this 10th day of November, 1925.

(Signed) HENRY H. FURTH
Attorney for Plaintiff.

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29 Praecipe for Transcript and Election as to Printing.

Filed November 10, 1925.

To James J. O'Connor,
Clerk, United States District Court.

You are hereby notified that the defendant in the above entitled cause, in which a Writ of Error has been issued to the United States Circuit Court of Appeals for the 8th Judicial Circuit, desires to file in said Court of Appeals a typewritten or manuscript transcript containing the following documents and proceedings in said cause, to-wit:

1. Petition.

2. Demurrer.

3. Memorandum of Oral Oponion of Court on Demurrer.

4. Record entries of Judgment.

5. Order granting Writ of Error.

6. Order granting time to file Bill of Exceptions.

7. Order showing filing of same.

8. Petition for Writ of Errors.

9. Assignment of Errors.

10. Writ of error and your return to same.

11. Citation.

12. Praecipe for transcript and certificate of Clerk to transcript.

You are further notified that plaintiff elects to have transcript of the record printed under the supervision of the Clerk of said Court of Appeals, under its rules, and requests that you make and have filed in said Court of Appeals said transcript here requested, in accordance with the rules of said Court of Appeals.

(Signed) CLAUDE M. CROOKS,
Attorney for Defendant.

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30 (Clerk's Certificate to Transcript)

I, Jas. J. O'Connor, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify, that the foregoing is a full, true and complete transcript of the record and proceedings in Cause No. 6990, At Law, wherein Milton C. Hellman is plaintiff, and Arnold J. Hellmich, Collector of Internal Revenue for the First Internal Revenue District of Missouri is defendant (except insofar as the same is restricted by the praecipe for transcript heretofore set out) as fully as the same remains on file and of record in my office,

and that the original Citation and Writ of Error are hereto attached and herewith returned.

Seal of the U. S. Dist. Court Eastern Div. Eastern Dist. of Missouri.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at Office in the City of St. Louis, in the Eastern Division of said District, this 9th day of January, in the year of our Lord, one thousand, nine hundred and twenty-six.

JAS. J. O'CONNOR
Clerk of said Court
By Joseph T. Spelman
Deputy.

Filed Jan. 9, 1926. E. E. Koch Clerk.

[Appearances of counsel; omitted in printing.]
[Minute entry of argument and submission, December 22, 1926; omitted in printing.]

24 In United States Circuit Court of Appeals, Eighth Circuit

No. 7299.—December Term, A. D. 1926

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., plaintiff in error vs. MILTON C. HELLMAN, DEFENDANT IN ERROR	In error to the District Court of the United States for the Eastern District of Missouri.

Mr. John R. Wheeler, special attorney, Bureau of Internal Revenue (Mr. Louis H. Breuer, United States attorney, Mr. Claude M. Crooks, assistant United States attorney, and Mr. A. W. Gregg, general counsel, Bureau of Internal Revenue, were with him on the brief), for plaintiff in error; Mr. Henry H. Furth, for defendant in error.

Before KENYON, *Circuit Judge*, and MOLYNEAUX and OTIS, *District Judges*

Opinion filed

March 18, 1927

KENYON, *Circuit Judge:*
The same question is involved in this case as in No. 7298, Arnold J. Hellmich, collector, etc., v. Isadore N. Hellman (opinion this day filed). In accordance with the decision in that case the judgment in this is *affirmed.*
Filed March 18, 1927.

25 In United States Circuit Court of Appeals

[Title omitted.]
In error to the District Court of the United States for the Eastern District of Missouri.

Judgment

March 18, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.
On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court, in this cause,

be, and the same is hereby, affirmed with costs, and that Milton C. Hellman have and recover against Arnold J. Hellmich, collector of internal revenue for the First District of Missouri, the sum of twenty dollars for his costs herein and have execution therefor.

26 United States Circuit Court of Appeals, Eighth Circuit

Clerk's certificate

[Clerk's certificate to foregoing transcript omitted in printing.]

27 Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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50411—27

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. —

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., petitioner

v.

ISADORE N. HELLMAN

No. —

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., petitioner

v.

MILTON C. HELLMAN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled cases on March 18, 1927 (*Isadore*

N. Hellman case, R. 28; *Milton C. Hellman case,* R. 23), affirming the judgments of the District Court for the Eastern District of Missouri (*Isadore N. Hellman case,* R. 14; *Milton C. Hellman case,* R. 15).

STATEMENT

The question in this case is whether under the Revenue Act of 1918, that part of a liquidating distribution of the assets of a dissolved corporation which represented earnings since February 28, 1913, was a dividend exempt from the normal tax, or whether all amounts distributed in the liquidation whether or not out of earnings accumulated since February 28, 1913, were to be treated as payments in exchange for the stock, and by comparison with the cost of the stock, gain or loss computed accordingly.

Section 201(a) of the Revenue Act of 1918, defined a dividend as "any distribution made by a corporation * * * out of its earnings or profits accumulated since February 28, 1913," and Section 216 (a) provided that "the amount received as dividends from a corporation which is taxable * * * upon its net income" were exempt from normal tax. On the other hand, subdivision(c) of Section 201 provided that "amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits." The distributions involved

in this case resulted entirely from the liquidation and dissolution of the corporation, but in part represented profits accumulated since February 28, 1913, and the question is whether they were exempt from normal tax and subject only to surtax.

Mutatis mutandis, the facts in these cases are the same. Each respondent on December 31, 1919, owned one-half of the outstanding capital stock of Hellman & Sons Fur and Wool Company, a Missouri corporation. On that date the corporation had a net surplus of $46,466.27, of which amount $31,545.58 consisted of earnings and profits accumulated since February 28, 1913. On December 31, 1919, this corporation dissolved and liquidated its entire assets, which were distributed to its two stockholders in exchange for the stock held by them. By such liquidation each of the respondents realized a gain of $15,004.55 over and above the cost or March 1, 1913, value of the stock owned by him. Neither respondent included in income taxes paid by him for 1919 any normal tax on this gain. Upon audit of their returns the Commissioner of Internal Revenue determined that normal taxes should have been paid thereon. Accordingly additional taxes were assessed against each respondent, paid under protest, and separate actions brought in the United States District Court for the Eastern District of Missouri for the recovery in each case of $1,200.35, with interest, said sum representing the amount of the additional tax

less certain overassessments. (Both cases, R. 4–9.)

The District Court gave judgment for the respondents (*Isadore N. Hellman case,* R 14; *Milton C. Hellman case,* R. 15) on the ground that the $15,004.55 gain was a dividend in the taxpayer's hands and therefore under Section 216(a) of the Revenue Act of 1918, *supra,* not subject to normal tax. Upon writs of error these judgments were affirmed by the Circuit Court of Appeals for the Eighth Circuit. (*Isadore N. Hellman case,* R. 28; *Milton C. Hellman case,* R. 23.)

ASSIGNMENT OF ERROR

The courts below erred in failing to hold that under Section 201 of the Revenue Act of 1918 the gain resulting from the distribution of the assets of a corporation in liquidation is subject to the normal tax, and in holding that to the extent such a liquidating distribution was made out of profits accumulated since February 28, 1913, it constituted a "dividend" exempt from normal tax.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is directly in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Langstaff* v. *Lucas,* 13 F. (2d) 1022; certiorari denied October 11, 1926. (47 Sup. Ct. 111.)

2. The decision is contrary to the decision of the Board of Tax Appeals in *Appeal of John K.*

Greenwood, 1 B. T. A. 291, and the regulations of the Treasury Department in force for the last seven years.

3. A decision by this Court is necessary in order that the law may be consistently and uniformly administered by the Treasury Department in similar cases now pending or arising in the future.

For these reasons it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals in these cases should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinions of the Circuit Court of Appeals for the Eighth Circuit (*Isadore N. Hellman case,* R. 21; *Milton C. Hellman case,* R. 22) are reported in 18 Fed. (2d) 239, 244. Those of the United States District Court for the Eastern District of Missouri (Both cases, R. 10) were not reported.

JURISDICTION

The judgments of the Circuit Court of Appeals sought to be reviewed were entered on March 18, 1927. (*Isadore N. Hellman case,* R. 28; *Milton C. Hellman case,* R. 23.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question in each of these cases is whether the gains resulting from the distribution of the assets of a dissolved corporation are subject to the normal tax under Section 201 of the Revenue Act of 1918 or are exempt as a dividend within the meaning of Section 216(a) of that Act, because made out of profits accumulated since February 28, 1913.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918 (c. 18, 40 Stat. 1057) are as follows (pp. 1059, 1062, 1069, 1143):

> SEC. 201. (a) That the term "dividend" when used in this title * * * means (1) any distribution made by a corporation, other than a personal service corporation, to its shareholders or members, whether in cash or in other property or in stock of the corporation, out of its earnings or profits accumulated since February 28, 1913 * * *.
>
> * * * * *
>
> (c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits.
>
> SEC. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the Reve-

nue Act of 1916 and by section 1 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates:

(a) For the calendar year 1918 * * *;

(b) For each calendar year thereafter, 8 per centum of the amount of the net income in excess of the credits provided in section 216: *Provided,* That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum.

SEC. 216. That for the purpose of the normal tax only there shall be allowed the following credits:

(a) The amount received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal service corporation out of earnings or profits upon which income tax has been imposed by Act of Congress * * *.

SEC. 1309. That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

Article 1548 of Treasury Regulations 45 (1920 edition), as amended by Treasury Decision 3206 (T. D. (Int. Rev.), Vol. 23, pp. 763, 769), provides as follows:

Distribution in liquidation.—So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payment for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost but less than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock on March 1, 1913. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.

STATEMENT

The facts in the cases, together with the assignment of error, are set forth in the petition.

ARGUMENT

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE INSTANT CASES IS DIRECTLY IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT IN LANGSTAFF V. LUCAS, 13 F. (2D) 1022, WHICH CASE CORRECTLY HOLDS THAT THE AMOUNTS DISTRIBUTED IN LIQUIDATION OF A CORPORATION ARE NOT DIVIDENDS WITHIN THE MEANING OF THE REVENUE ACT OF 1918, AND, TO THE EXTENT OF THE GAIN RECEIVED, ARE SUBJECT TO NORMAL TAXES

The Government contends that the correct principle for the solution of the question in the cases at bar is to be found in *Langstaff* v. *Lucas,* 9 F. (2d) 691 (D. C. W. D. Ky.); affirmed, 13 F. (2d) 1022 (C. C. A. 6th); certiorari denied, 47 Sup Ct. 111. That case was based upon facts similar to those in the cases at bar, presented the same question, and involved the same sections of the Revenue Act of 1918. In the *Langstaff case* the District Court, after pointing out that this Court in *Lynch* v. *Hornby,* 247 U. S. 339, in another connection, had drawn a distinction between a dividend and a distribution in complete liquidation of a corporation, goes on to say in part (p. 694):

> Loosely speaking, the distribution to the stockholders of a corporation's assets, upon liquidation, might be termed a dividend; but this is not what is generally meant and understood by that word. As generally understood and used, a dividend is a return upon the stock of its stockholders, paid to them by

> a going corporation without reducing their stockholdings, leaving them in a position to enjoy future returns upon the same stock. * * * In other words, it is earnings paid to him [the individual stockholder] by the corporation upon his invested capital therein, without wiping out his capital. On the other hand, when a solvent corporation dissolves and liquidates, it distributes to its stockholders, not only any earnings it may have on hand, but it also pays to them their invested capital, namely, the amount which they had paid in for their stock, thus wiping out their interest in the company. As heretofore suggested, the corporation in effect buys up and retires all of its outstanding stock.

After setting out subdivisions (a) and (c) of Section 201 of the Revenue Act of 1918, *supra,* the court continues (p. 694):

> This section strips distributions made to stockholders in liquidation of a corporation of all disguises and declares that they shall be considered for what they in effect are—purchases of all their outstanding stock by the liquidating corporations, and not dividends as generally understood, and as defined in section 201, subsection (a), and as used in section 216. So construed, subsection (c) of section 201 puts the stockholder who holds his stock up to the time of liquidation, and then in effect sells it to the corporation, upon exactly the same footing as the stockholder who sells his stock to another

> during the operating life of the corporation. The latter unquestionably, under the act of 1918, was required to pay both the normal and surtax upon any profit realized by him in the transaction. That is all the former was required to do under the act as here construed.
>
> For the reasons stated, the court is forced to the conclusion that it was not intended by Congress that so-called liquidating dividends, to the extent of the profit received, should escape the normal tax.

In affirming the above decision of the District Court the Circuit Court of Appeals for the Sixth Circuit says (13 F. (2d) 1022):

> PER CURIAM. After considering carefully the reasons urged against it, we feel satisfied to affirm the judgment, and we do so upon the reasoning and conclusions of the District Judge. Although the half interest in the corporate assets which came to Langstaff was within the broad definition of "dividend" in section 201(a) * * * yet the transaction was the very one specifically provided for in the last sentence of section 201(c), and the half interest became the proceeds of the sale of Langstaff's stock in the corporation, instead of a corporate dividend. Only so can the sections be effectively read together.

Petition for certiorari in the *Langstaff case* was denied October 11, 1926. (47 Sup. Ct. 111.)

The same position is also adopted by the Board of Tax Appeals in *Appeal of John K. Greenwood,*

1 B. T. A. 291, and it is submitted that it correctly interprets the law.

As the court below said:

> Plausible argument can be presented for the position taken by either side to the controversy as to the construction of subdivisions (a) and (c) of section 201.

The court below then applied the rule that doubts are to be resolved in favor of the taxpayer.

There is another rule to be taken into account and that is the effect of administrative construction. For seven years there have been regulations of the Treasury Department in effect construing these sections. The construction adopted by the Treasury has been uniformly applied to all cases arising during that period. This is the first case in which the position of the Treasury Department has been rejected by a court. Whatever doubt there might be as to the meaning of the law and as to the decision if the question were a new one, it is a most appropriate case in which to follow an administrative construction.

The Circuit Court of Appeals in the instant cases states that the *Langstaff case, supra,* and the *Greenwood appeal, supra,* are authorities against the view taken by it, but says (*Isadore N. Hellman case,* R. 26) it is "unable to agree with these decisions."

CONCLUSION

It is important that this Court settle the conflict of opinion on the question here involved which has

arisen between the Circuit Court of Appeals for the Eighth Circuit in the instant cases and the Circuit Court of Appeals for the Sixth Circuit in *Langstaff* v. *Lucas, supra,* in order that there may be a uniform rule for the guidance of the Treasury Department in administering the law. It is respectfully submitted, therefore, that the petition for writs of certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
SEWALL KEY,
Attorney.

JUNE, 1927.

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